UNITED STATES OF AMERICA
MERIT SYSTEMS PROTECTION BOARD

CARL M. COLE, Administrator of the Estate of JANE M. PICKERING,[1] Appellant,	)	DOCKET NUMBER NY-0752-96-0150-I-1
v.	)	
DEPARTMENT OF VETERANS AFFAIRS, Agency.	)	DATE: JAN 26, 1998

Robert C. Laity, Tonawanda, New York, for the appellant.

John Quagliana, Buffalo, New York, for the agency.

BEFORE

Ben L. Erdreich, Chairman
Beth S. Slavet, Vice Chair
Susanne T. Marshall, Member

OPINION AND ORDER

The appellant petitions for review of an initial decision that sustained the agency's removal action. For the reasons discussed below, we find that the petition does not meet the criteria for review set forth at 5 C.F.R. § 1201.115, and

[1] On petition for review, the appellant's representative informed the Board that the appellant died on December 31, 1996, and timely moved that Carl M. Cole, Public Administrator of the appellant's estate, be substituted as the party in this appeal. The agency has not opposed the motion for substitution. We GRANT the motion. 5 C.F.R. § 1201.35.

we therefore DENY it. We REOPEN this case on our own motion under 5 C.F.R. § 1201.118, however, and AFFIRM the initial decision AS MODIFIED by this Opinion and Order, still SUSTAINING the removal action.

BACKGROUND

Effective December 8, 1995, the agency removed the appellant from her[2] GS-7 Medical Technician position. Initial Appeal File (IAF), Tab 3, Subtabs 4b, 4c. On timely appeal to the Board, the administrative judge (AJ) held a hearing and then issued the initial decision sustaining the removal action and denying the appellant's claims of disability discrimination and retaliation for prior equal employment opportunity (EEO) activity. Initial Decision (ID), IAF, Tab 29.

The appellant has timely filed a petition for review.[3] Petition for Review (PR), Petition for Review File (PRF), Tab 6. The agency has timely responded in opposition to the appellant's petition. PRF, Tab 7.

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[2] Throughout this Opinion and Order, feminine pronouns are used to refer to the appellant, even though the individual currently substituted for her as the party appears to be a male. *See supra* n.1.

[3] The appellant requests "CONCURRENT" review of the initial decision by the Board and by the Equal Employment Opportunity Commission (EEOC). Petition for Review File (PRF), Tab 6; *see id.*, Tabs 1, 3. Such concurrent review is not available under the applicable procedures, but, after the Board issues this final decision, the appellant may request that the EEOC review the Board's decision. *See* 5 U.S.C. § 7702(b)(1); 5 C.F.R. § 1201.161. The instructions for requesting EEOC review are set forth in the text below under the section entitled "NOTICE TO THE APPELLANT REGARDING FURTHER REVIEW RIGHTS."

(Continuation of note three)

The appellant states on review that she has a pending case before the EEOC, EEOC Docket No. 01956634, on her disability discrimination claim. PRF, Tab 6 at 2. The record shows that the referenced EEOC case does not involve the removal action in the instant appeal. IAF, Tab 3, Subtabs 4e, 4g.

ANALYSIS

AJ's procedural rulings

The appellant contends on review that the AJ "behaved most unprofessionally" in various specified ways prior to the hearing and that her several requests for the AJ to disqualify himself were denied. PR at 14-16. The record shows that, after the appellant filed a defective motion for disqualification, she was informed of the requirements for filing such a motion, including the requirement that she submit an affidavit or sworn statement, under 5 C.F.R. § 1201.42(b). IAF, Tab 17. The appellant failed to file a corrected motion. *Id.* The AJ therefore denied the motion, "for defect of service and form." *Id.*; *Ben Espinoza v. Department of the Navy*, 69 M.S.P.R. 679, 684, *cause dismissed*, 86 F.3d 1174 (Fed. Cir. 1996) (Table); *see also Lee v. U.S. Postal Service*, 48 M.S.P.R. 274, 281 (1991). The AJ subsequently denied the appellant's renewed motion for disqualification, as well as her motion for an interlocutory appeal of the AJ's denials, finding that there was no showing that an immediate ruling would materially advance the completion of the proceeding or that the denial of an immediate ruling would cause undue harm to a party or the public. IAF, Tab 19 at 2; 5 C.F.R. § 1201.92(b); *see* 5 C.F.R. §§ 1201.91, 1201.92; *Robinson v. Department of the Army*, 50 M.S.P.R. 412, 418 (1991). The appellant does not specify on review why the AJ's rulings on these motions were in error; nor can we discern any material error in the rulings.

The appellant argues on review that the AJ made various improper procedural rulings, such as reducing her witness list, failing to sanction the agency for sending copies of its filings to the appellant using the wrong address, and limiting her submission deadlines. PR at 14-16. Even assuming that the appellant timely objected below to all of these alleged procedural errors so as to preserve them for review, *see Tarpley v. U.S. Postal Service*, 37 M.S.P.R. 579, 581 (1988) (the appellant's failure to timely object below to procedural rulings

precluded his doing so on review), she fails to explain on review how they prejudiced her substantive rights, *see Karapinka v. Department of Energy*, 6 M.S.P.R. 124, 127 (1981) (the administrative judge's procedural error is of no legal consequence unless it is shown to have adversely affected a party's substantive rights).

The charges

> In effecting the removal action, the agency alleged as follows:
>
> You [the appellant] have been absent from employment at this Medical Center and have been in a continuous non-pay status since April 12, 1994. You have been charged absent without leave since August 8, 1994 to the present because you have not reported for duty. By letter, on February 3, 1995, you were offered reasonable accommodation and were requested to report for work on February 13, 1995. On February 17, 1995, you were requested by letter to contact your supervisor to arrange a return to duty date. You failed to comply with that request. You failed to report and failed to request or obtain leave from scheduled employment. You also failed to comply with a reasonable request to resume duty status in an accommodating position.

The agency alleged that such actions by the appellant constituted a violation of specified agency regulations, policies, and guidelines regarding employees' obligations as to attendance and following instructions. IAF, Tab 3, Subtab 4f (proposal notice); *see id.*, Subtab 4b (decision notice).

Although the AJ described the charges in his initial decision, he made no explicit findings whatsoever regarding the charges. ID at 2. The initial decision does not indicate, and the record does not show, that the parties stipulated to the charges. IAF, Tabs 23 (prehearing conference tape), 26 (Hearing Tape 1). Although the appellant does not raise this matter on petition for review, we reopen this appeal to correct the AJ's omission. *See generally Spithaler v. Office of Personnel Management*, 1 M.S.P.R. 587, 589 (1980) (an initial decision must identify all material issues of fact and law, summarize the evidence, resolve issues of credibility, and include the administrative judge's conclusions of law and his

legal reasoning, as well as the authorities on which that reasoning rests). Because our adjudication of the charges, as well as the issues of nexus and penalty, does not require credibility determinations, we find it unnecessary to remand the appeal. *See Uske v. U.S. Postal Service*, 60 M.S.P.R. 544, 557 (1994), *aff'd*, 56 F.3d 1375 (Fed. Cir. 1995), *cert. denied*, 116 S. Ct. 728 (1996).

We find it necessary to address only the charge that the appellant was in a continuous non-pay status since April 12, 1994, because this charge alone is sufficient under the circumstances to justify the penalty of removal, as further discussed below. *See Crutchfield v. Department of the Navy*, 73 M.S.P.R. 444, 448 (1997) (the Board found it unnecessary to address certain specifications of a charge where the remaining specifications were sufficient to warrant sustaining the charge and the penalty); *see also New v. Veterans Administration*, 40 M.S.P.R. 212, 215-16 (1989) (any error by the AJ in failing to adjudicate a charge did not prejudice the appellant's substantive rights where the charge sustained by the AJ was sufficient to justify the penalty of removal).

The undisputed record evidence shows that the appellant stopped working on October 4, 1993, when she took several weeks of emergency annual leave to care for her son. She subsequently requested continued leave, citing her rheumatoid arthritis and depression. By April 12, 1994, she exhausted her sick and annual leave balances, as well as donated leave made available through the Voluntary Leave Donor Program, and was placed on non-paid status until she was removed. IAF, Tab 3, Subtabs 4o, 4ii, 4kk, 4ll, 4mm, 4nn; *see also id*., Subtab 4f.

An agency may take an adverse action based on excessive use of leave without pay (LWOP), where (1) the record shows that the employee was absent for compelling reasons beyond her control so that the agency's approval or disapproval of leave was immaterial because the employee could not be on the job; (2) the absences continued beyond a reasonable time, and the employee was warned that adverse action might be initiated unless the employee became

available for duty on a regular, full-time or part-time basis; and (3) the agency shows that the position must be filled by an employee available for duty on a regular, full-time or part-time basis. *Holderness v. Defense Commissary Agency*, 75 M.S.P.R. 401, 404 (1997).

First, the appellant's absences here were due to her severe, incapacitating rheumatoid arthritis, a compelling reason beyond her control, so that the agency's approval or disapproval of leave was immaterial. *See* IAF, Tab 3, Subtabs 4m (statement by Dr. S. Robert Michalski, an internist and rheumatologist who was the appellant's treating physician), 4r (statement by the appellant), 4s (statement by Dr. Michalski), 4ff (same), 4hh (same), and Tab 13 (same). Second, her total continuous absences lasted more than two years, of which her continuous unpaid absences lasted more than nineteen months and, thus, continued beyond a reasonable period of time. In addition, the agency specifically warned the appellant several times that an adverse action up to and including removal might be initiated unless she became available for duty on a regular, full-time or part-time basis. IAF, Tab 3, Subtabs 4j, 4l. And third, the record shows that the agency considered the appellant's Medical Technician position on the evening shift to be a "critical" position, solicited volunteers for the position during her absence, and assigned other staff members to perform her duties during her absence. IAF, Tab 3, Subtabs 4o, 4cc, 4ee. The agency deciding official stated that the appellant's absences resulted in "thousands of dollars in overtime and unscheduled hours." IAF, Tab 24, Exhibit 5 at 4. The record thus shows that the position needed to be filled by an employee available for duty on a regular, full-time or part-time basis. We therefore find that the criteria for sustaining a charge of excessive unpaid absences are satisfied here.[4]

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[4] We note that the agency charged the appellant with absence without leave (AWOL) for her continuous absences after August 8, 1994. We find it

The appellant reiterates on review her contention below that she was entitled to leave under the Family and Medical Leave Act of 1993 (FMLA) during the relevant times. PR at 8; IAF, Tab 5. Because she timely raised this contention below, we find that the AJ erred by failing to address it in his initial decision. *See Spithaler*, 1 M.S.P.R. at 589; *see also Ellshoff v. Department of the Interior*, 76 M.S.P.R. 54, 73 (1997). We further find, however, that the AJ's adjudicatory error in this regard does not warrant reversal of the initial decision because it did not prejudice the appellant's substantive rights, as discussed below. *Panter v. Department of the Air Force*, 22 M.S.P.R. 281, 282 (1984).

The FMLA became effective on August 5, 1993, for non-Postal federal civilian employees, thus potentially covering the appellant's unpaid absences commencing April 12, 1994. 5 U.S.C.A. § 6381, Historical and Statutory Notes; *see Ellshoff*, 76 M.S.P.R. at 75. Even assuming that the appellant satisfied all of the criteria for entitlement to FMLA leave during the relevant times, however, the maximum amount of FMLA leave which may be taken during "any 12-month period" is "12 administrative workweeks." 5 U.S.C. § 6382(a)(1); 5 C.F.R. § 630.1203; *Ellshoff*, 76 M.S.P.R. at 75. Because the appellant's unpaid leave lasted for more than nineteen months, the FMLA does not preclude sustaining the charge of excessive use of unpaid leave here.

Efficiency of the Service

The appellant does not dispute, and we find, that there is a nexus between absence-related charges, such as the sustained charge of prolonged unpaid leave here, and the efficiency of the service. *See* ID at 5; *Gaskins v. Department of the Air Force*, 36 M.S.P.R. 331, 334-35 (1988) (implicitly finding such a nexus).

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unnecessary to address the propriety of this AWOL charge because, for purposes of sustaining the charge of prolonged unpaid absence, the relevant fact is that, regardless of the propriety of the AWOL charge, the appellant had no leave to cover her absences commencing April 12, 1994.

Penalty

Because we have sustained only one of the agency's charges, we will conduct an independent evaluation of the pertinent factors under *Douglas v. Veterans Administration*, 5 M.S.P.R. 280, 305-06 (1981), to determine the appropriate penalty. *See Hamilton v. U.S. Postal Service*, 71 M.S.P.R. 547, 557 (1996) (citing *White v. U.S. Postal Service*, 71 M.S.P.R. 521, 524-28 (1996)).

It is well-established that prolonged absence with no foreseeable end constitutes just cause for removal. *Bucci v. Department of Education*, 43 M.S.P.R. 558, 565 (1990) (citing *Desiderio v. Department of the Navy*, 4 M.S.P.R. 84, 86 (1980)); *McKenzie v. U.S. Postal Service*, 1 M.S.P.R. 496, 497 (1980). As discussed above, the appellant was continuously absent for more than two years, and was on unpaid status for nineteen months, before she was removed. In addition, as further discussed below regarding the appellant's claim of disability discrimination, her treating physician reported that she suffered from severe rheumatoid arthritis that rendered her permanently disabled from performing her regularly assigned duties, and she refused the agency's numerous attempts to accommodate her disability. We therefore find that the appellant's prolonged absence had no foreseeable end.

It is undisputed that the appellant had more than twenty-five years of service. ID at 6; IAF, Tab 3, Subtab 4c. The Board has held, however, that lengthy years of service do not warrant mitigating the penalty of removal where the appellant was absent without a foreseeable end. *See Cresson v. Department of the Air Force*, 33 M.S.P.R. 178, 184-85 (1987) (removal was a reasonable penalty for excessive absences, notwithstanding the appellant's thirty-five years of service and absence of a prior disciplinary record). For these reasons, we find that the penalty of removal was reasonable under the circumstances. *See also Gaskins*, 36 M.S.P.R. at 332, 334 (the Board affirmed the appellant's removal based on a "non-disciplinary charge of continuous unscheduled absence on leave without pay"); *Bentley v. U.S. Postal Service*, 20 M.S.P.R. 208, 210 (1984) (an employee's absence for which there is no foreseeable end in sight is a burden which no agency is required to bear); *Nunes v. Equal Employment Opportunity Commission*, 13 M.S.P.R. 428, 431 (1982) (the agency was not required to tolerate the employee's prolonged absence due to a medical condition which had no foreseeable end).

Harmful Procedural Error

The appellant reiterates on review her claim below that the agency violated procedural regulations in removing her, by issuing a decision notice that removed her retroactively. PR at 14; IAF, Tabs 5, 25. Because the appellant timely raised this claim below, we find that the AJ erred by failing to address it in his initial decision. *See Spithaler*, 1 M.S.P.R. at 589. We further find, however, that the AJ's adjudicatory error in this regard does not warrant reversal of the initial decision because it did not prejudice the appellant's substantive rights, as discussed below. *Panter*, 22 M.S.P.R. at 282.

In a November 29, 1995 letter, the appellant informed the agency that she did not receive the agency's October 31, 1995 notice of proposed removal until November 15, 1995. IAF, Tab 3, Subtab 4d. This was apparently due to her

having moved to a different address. IAF, Tab 12, Agency Exhibit 8. The appellant requested additional time to make an oral response. IAF, Tab 3, Subtab 4d. The agency allowed the appellant to make an oral response on December 7, 1995, before issuing the decision notice on December 21, 1995, which removed the appellant effective December 8, 1995. IAF, Tab 3, Subtab 4b. The agency's actions in this regard violated 5 C.F.R. § 752.404(f), which provides that "[t]he agency shall deliver the notice of [the adverse-action] decision to the employee at or before the time the action will be effective ...." *Compare* 5 U.S.C. § 7513(b) (the statute does not establish a time frame).

An agency's procedural error, whether regulatory or statutory, warrants reversal of the agency's action only if it likely had a harmful effect upon the outcome of the case before the agency. *Stephen v. Department of the Air Force*, 47 M.S.P.R. 672, 681 (1991). The appellant has the burden of proof in this regard. *Id.* at 685. She has not explained below or on review how this procedural error by the agency likely had a harmful effect upon the outcome of the case before the agency. She merely stated that the procedural error shortened the period of time she had to file this Board appeal. IAF, Tab 25. Because the appellant failed to show that the procedural error likely had a harmful effect upon the outcome of the case before the agency, we find that the procedural error does not warrant reversal of the agency's action.[5]

Regarding the appellant's contention that the agency's procedural error shortened the period of time she had to file this Board appeal, we note that, in *Loui v. Merit Systems Protection Board*, 25 F.3d 1011, 1014 (Fed. Cir. 1994), the court relied on the agency's obligation under 5 C.F.R. § 752.404(f) to hold that, when the notice of the adverse action was not dated or delivered to the employee

until after the effective date listed therein, the time period for filing the Board appeal did not begin to run until the notice was delivered to the employee. *See also McClendon v. Department of the Air Force*, 66 M.S.P.R. 211, 213-14 (1995). Here, unlike in *Loui*, the appellant managed to timely file the appeal, notwithstanding the agency's failure to comply with 5 C.F.R. § 752.404(f). Moreover, to the extent the appellant suggested that she did not have adequate time to prepare her petition for appeal, she had ample opportunity below to supplement any inadequacy in the petition for appeal. *See, e.g.*, IAF, Tabs 5, 8, 13.

Disability discrimination

To establish a claim of disability discrimination, an appellant must first show that she was "disabled." *See* 29 C.F.R. § 1614.203(a)(1); *Miller v. U.S. Postal Service*, 43 M.S.P.R. 473, 477 (1990). The AJ found, and it is undisputed, that the appellant was disabled due to her severe rheumatoid arthritis. ID at 4-5. The next question to be determined is whether the appellant was a qualified disabled person and, thus, entitled to reasonable accommodation. *See* 29 C.F.R. § 1614.203(a); *Holderness*, 75 M.S.P.R. at 404. The AJ found in this regard that the appellant failed to establish that she was a qualified disabled person because the unpredictable nature of her rheumatoid "flares" rendered her incapable of being "present for duty on a routine basis." ID at 5. Without addressing the propriety of the AJ's finding, we find that the appellant failed to establish that she was a qualified disabled person because she failed to articulate a reasonable accommodation that would enable her to work, as discussed below.

An appellant has the burden of establishing that she is a qualified disabled person, including the initial burden of articulating a reasonable accommodation

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[5] We note that, because the appellant was on unpaid leave status during the relevant times, she did not lose any pay due to the agency's failure to comply with

under which she believes she could perform the essential duties of her position or of a vacant position to which she could be reassigned. *See* 29 C.F.R. § 1614.203(a)(6); *Holderness*, 75 M.S.P.R. at 404; *Clark v. U.S. Postal Service*, 74 M.S.P.R. 552, 561-62 (1997); *Gray v. U.S. Postal Service*, 59 M.S.P.R. 142, 147-48 (1993). In determining whether the appellant's articulated accommodation of reassignment to the day shift was reasonable, we have considered the following background facts and circumstances.

Dr. Michalski stated in a March 30, 1994 report that the appellant had "[s]evere rheumatoid arthritis with potential for explosive reaction," and had permanent joint damage to her knees and hands. He stated that the appellant had "[f]requent flares ... in [her] right shoulders, wrist and elbow and left hand," and had reduction of range of motion, strength, and dexterity involving her joints. He further stated that "[t]he major stresses seem to be the physical demands of working the second [evening] shift," where "[d]uties are not shared, there is continual walking, poor breaks for relief and lifting of heavy 'reagent' containers," as well as "continual jobs that require repeated fine motor ability that aggravate the knuckles." He recommended that the appellant be assigned to the day shift (the "administrative" shift) from 8:00 a.m. to 4:30 p.m., instead of her current evening shift, from 2:30 p.m. to 11:00 p.m. IAF, Tab 3, Subtab 4ff; *see also id.*, Subtab 4hh (Dr. Michalski's March 17, 1994 report).

In May 1994, the agency offered her the option of either part-time duties in her current position, or a part-time or full-time Medical Technician position in the Chemistry section (with five-weeks training to be provided by the agency). *Id.*, Subtabs 4t, 4v, 4z. Both of these positions were in the evening shift, but they were consistent with Dr. Michalski's recommendations such as that co-workers be present to assist the appellant when necessary. *Id.* The appellant initially indicated that she would probably accept the first option (part-time duties in her

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5 C.F.R. § 752.404(f).

current position), but noted that she was awaiting resolution of an EEO complaint, a disability retirement claim, and a workers' compensation claim. *Id.*, Subtab 4z. She ultimately rejected both options, however. *Id.*, Subtab 4t. The appellant also rejected a subsequent agency offer of a Medical Technician position in the Hematology section in the early-morning shift, from 6:00 a.m. to 2:30 p.m., on the basis that she could not perform phlebotomy (blood-drawing) duties required for that shift. *See id.*, Subtabs 4t, 4r.

In a January 18, 1995 letter, Dr. Michalski stated that the appellant could perform her job duties if she was provided specified equipment such as ergonomic chairs, was assisted by others in performing duties such as heavy lifting, and was not required to work alone. IAF, Tab 3, Subtab 4m, Tab 12, Agency Exhibit 4. In a February 3, 1995 letter, the agency stated that it had restructured the appellant's position in specified ways to comply with Dr. Michalski's recommendations. IAF, Tab 3, Subtab 4l. For instance, the agency stated that it would provide all of the equipment recommended by Dr. Michalski, install a "medic alert type" system to provide the appellant immediate access to medical care when necessary, would assign another employee to assist her when necessary, and would not require her to lift heavy "reagent" containers. *Id.* The agency instructed the appellant to report for two-weeks training on February 13, 1995, at 8 a.m. *Id.* She refused to report to work on February 13, citing inadequate advance notice to return to work, and did not contact her supervisor for an alternative starting date. *Id.*, Subtab 4j. Instead, she submitted a February 9, 1995 note on Dr. Michalski's prescription pad stating simply that the offered accommodation was "unacceptable and detrimental to the appellant's disability." *Id.*, Subtab 4k. The note did not explain why the position was unacceptable. *Cf. Lassiter v. Department of the Interior*, 60 M.S.P.R. 138, 142 (1993) (the probative value of medical opinion depends on, among other things, whether the opinion provided reasoned explanation for its findings, as distinct from mere conclusory assertions).

In May 1995, the agency considered her for a vacant Health Technician position, but determined that she was not qualified for the position. IAF, Tab 3, Subtab 4h. In a post-removal letter dated April 19, 1996, Dr. Michalski stated that, despite medications, the appellant still had "active inflammation and a lot of morning and night stiffness and pain which certainly affects her ability to work very early in the morning or at night" and that she would benefit from a change to the day shift. IAF, Tab 13.

Before the AJ and on review, the appellant insisted that the only accommodation that would enable her to work was reassignment to the day shift. PR at 3; IAF, Tab 5. As noted above, Dr. Michalski recommended that the appellant work the day shift because of access to co-workers' help in performing her job duties and in receiving care for her unpredictable "flares."[6] He conceded during the hearing, however, that his recommendation of the day shift was based solely on the appellant's description of the work situation and that the appellant did not inform him of the agency's February 1995 accommodation offer, which was in response to his recommendations. Hearing Tape 1. He further conceded that the agency's February 1995 accommodation offer, which would have allowed the appellant to take breaks, to obtain assistance from co-workers when necessary, and to be excused from lifting heavy "reagent" containers, would have enabled her to perform her job duties, so long as the other co-workers' availability for assistance was sufficiently constant. *Id.* He provided no medical rationale as to why the day shift per se would have been efficacious in enabling her to perform her job duties. *Id.*; *see Lassiter*, 60 M.S.P.R. at 142.

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[6] We note that, in response to Dr. Michalski's recommendation, the agency sought volunteers from the day shift to switch with the appellant's evening shift, but no one volunteered. IAF, Tab 3, Subtabs 4z, 4cc, 4ee. The agency therefore informed the appellant in April 1994 that there were no volunteers on the day

Moreover, Dr. Floyd A. Green, a specialist in rheumatoid diseases at the professorial level who testified on behalf of the agency, stated that his review of Dr. Michalski's reports recommending the day shift revealed that Dr. Michalski's recommendation was not based on any medical reasons related to the appellant's rheumatoid arthritis and was simply based on her statements regarding the alleged difficulties of working the evening shift. Hearing Tape 2; *see Lassiter*, 60 M.S.P.R. at 142. Dr. Green further testified that the shift worked by the appellant would have little to do with her ability to work and that, if anything, the day shift would tend to be more problematic because rheumatoid arthritis causes severe morning stiffness of several hours' duration after awakening; he stated, based on his thirty-plus years of experience and research in the field of rheumatology, that there was no such thing as night stiffness due to rheumatoid arthritis. *Id.*; ID at 4. Thus, the record establishes that the day shift per se would not have been efficacious in allowing her to perform her job duties. *See Vande Zande v. State of Wisconsin Department of Administration*, 44 F.3d 538, 543 (7th Cir. 1995) (the employee must show that the accommodation is reasonable in terms of both efficacy and proportionality to cost, before the issue of undue hardship is considered); *see also Wilson v. Immigration & Naturalization Service*, 55 M.S.P.R. 40, 44 & n.3 (1992) (the requested reassignment to a temporary position did not constitute reasonable accommodation because the essential functions, which the appellant could not perform, would be the same).

Regarding the appellant's contention below and on review that she could not work the evening shift because emergency medical care at the agency's medical center was only available to employees during the day shift, the AJ found that she failed to present any evidence to show that medical care would not be available during the evening shift. ID at 4. On review, the appellant contends

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shift to exchange shifts with the appellant and that there were no other vacant positions in the day shift to which she could be reassigned. *Id.*, Subtab 4ee.

that the agency's denial of emergency care in 1993 that resulted in her eventual hospitalization proves the unavailability of emergency medical care on the evening shift. PR at 2, 3, 5, 6. She concedes, however, that she was entitled to such emergency care under the collective bargaining agreement. *Id.* Moreover, Gerald Logue, Chief of Staff at the Buffalo Veterans Administration Medical Center where the appellant worked, provided uncontradicted testimony that all employees, regardless of their shift, are entitled to on-site medical care, including emergency medical care. Hearing Tape 3. Under these circumstances, we find that the appellant's contention that the agency unjustifiably denied her emergency medical care in 1993, even if true, is insufficient by itself to establish that emergency medical care would be unavailable during the evening shift. Moreover, as discussed above, the agency specifically offered to accommodate the appellant's unpredictable flares by installing a medic-alert type system to facilitate her obtaining emergency medical care. Neither the appellant nor her doctor has stated that such an accommodation would not have been efficacious in obtaining emergency medical care for her rheumatoid flares. We therefore find that the appellant's reliance on the availability of on-site emergency medical care to support her insistence on reassignment to the day shift was not reasonable. *Cf. Beck v. University of Wisconsin Board of Regents*, 75 F.3d 1130, 1335-36 (7th Cir. 1996) (the employee is obligated to make a good faith effort to work with his employer to determine what constitutes a reasonable accommodation); *Hyatt v. U.S. Postal Service*, 8 M.S.P.R. 362, 365-66 (1981) (the appellant failed to make a prima facie showing of disability discrimination where he insisted on being reassigned to a particular position, rejected other offered positions, and otherwise refused to cooperate with the agency in its accommodation efforts). For the reasons discussed above, we conclude that the appellant's articulated accommodation of reassignment to the day shift was not reasonable under the

circumstances and that she thus failed to establish that she was a qualified disabled person entitled to reasonable accommodation.[7]

Retaliation for prior EEO activity

The AJ found that the appellant failed to establish her claim of retaliation for prior EEO activity because she failed to present any evidence in support of the claim. ID at 6. On petition for review, the appellant contends that the record shows that she was a union official who represented other employees and had a pending EEO case of her own at the time she was removed. PR at 11. She further contends that the agency deciding official's "Douglas" statement, discussing the factors considered in determining the penalty, reveals the agency's animus against her for prior union and EEO activity. PR at 12.

Regarding the appellant's claim of retaliation for union activity, we need not consider it because the appellant failed to raise it below. 5 C.F.R. § 1201.24(b); *Nugent v. U.S. Postal Service*, 59 M.S.P.R. 444, 448 (1993), *review dismissed*, 36 F.3d 1107 (Fed. Cir. 1994) (Table). Regarding her claim of retaliation for EEO activity, the "Douglas" statement does not mention her EEO activity, and the mere fact that she engaged in EEO activity is insufficient to establish a claim of retaliation. *See Adair v. U.S. Postal Service*, 66 M.S.P.R. 159, 165 (1995) (for an appellant to prevail on a contention of illegal retaliation, she has the burden of showing that (1) the appellant engaged in protected activity; (2) the accused official knew of the protected activity; (3) the adverse action

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[7] On petition for review, the appellant contends that the articulated accommodation would have ameliorated her depression. PR at 7-8. However, she refers to no medical evidence of record showing that working the day shift, as opposed to the evening shift, would ameliorate her depression. The appellant also raises numerous other arguments related to her disability discrimination claim. We have not discussed them because they are vague and ambiguous, patently contrary to the record evidence, and/or unsupported by any references to the record; moreover, they are not material to the analysis provided in the text above.

under review could have been retaliation under the circumstances; and (4) there was a genuine nexus between the alleged retaliation and the adverse action). We therefore find that the appellant failed to show error in the AJ's determination that she failed to establish her claim of retaliation for EEO activity.

ORDER

This is the final order of the Merit Systems Protection Board in this appeal. 5 C.F.R. § 1201.113(c).

NOTICE TO THE APPELLANT REGARDING FURTHER REVIEW RIGHTS

You have the right to request further review of the Board's final decision in your appeal.

Discrimination Claims: Administrative Review

You may request the Equal Employment Opportunity Commission (EEOC) to review the Board's final decision on your discrimination claims. *See* 5 U.S.C. § 7702(b)(1). You must submit your request to the EEOC at the following address:

Equal Employment Opportunity Commission
Office of Federal Operations
P.O. Box 19848
Washington, DC 20036

You should submit your request to the EEOC no later than 30 calendar days after receipt of this order by your representative, if you have one, or receipt by you personally, whichever receipt occurs first. 5 U.S.C. § 7702(b)(1).

Discrimination and Other Claims: Judicial Action

If you do not request review of this order on your discrimination claims by the EEOC, you may file a civil action against the agency on both your discrimination claims and your other claims in an appropriate United States district court. *See* 5 U.S.C. § 7703(b)(2). You should file your civil action with the district court no later than 30 calendar days after receipt of this order by your

representative, if you have one, or receipt by you personally, whichever receipt occurs first. *See* 5 U.S.C. § 7703(b)(2). If the action involves a claim of discrimination based on race, color, religion, sex, national origin, or a disabling condition, you may be entitled to representation by a court-appointed lawyer and to waiver of any requirement of prepayment of fees, costs, or other security. *See* 42 U.S.C. § 2000e5(f); 29 U.S.C. § 794a.

Other Claims: Judicial Review

If you choose not to seek review of the Board's decision on your discrimination claims, you may request the United States Court of Appeals for the Federal Circuit to review the Board's final decision on other issues in your appeal if the court has jurisdiction. *See* 5 U.S.C. § 7703(b)(1). You must submit your request to the court at the following address:

United States Court of Appeals
for the Federal Circuit
717 Madison Place, N.W.
Washington, DC 20439

The court must receive your request for review no later than 30 calendar days after receipt of this order by your representative, if you have one, or receipt by you personally, whichever receipt occurs first. *See* 5 U.S.C. § 7703(b)(1).

FOR THE BOARD:

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Robert E. Taylor
Clerk of the Board

Washington, D.C.